Goh Wee Khian & Ors v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS Q-05–184 OF 2010, Q-05–185 OF 2010, Q-05–186 OF 2010 AND Q-05–187 OF 2010
AZAHAR MOHAMED, BALIA YUSOF AND LIM YEE LAN JJCA
13 MAY 2013

Criminal Law — Murder — Common intention — Vicarious or constructive liable — Secondary offenders — Constructive liability of — Common intention among appellants — Existence of — Whether sufficient evidence to infer common intention among all four appellants — Whether physically present and participation crucial — Penal Code s 34

Criminal Procedure — Appeal — Appeal against conviction and sentence — Common intention — First appellant master planner of whole crime — Second appellant recruited third and fourth appellants — Whether third and fourth appellants actual perpetrators of crime — Whether common intention established — Deceased suffered nine stab wounds on chest, neck and abdomen — Allegation that deceased self-inflicted wounds — Whether unbelievable as defying common sense and discordant with common course of human affairs — Whether prima face case against appellants established — Whether trial judge conducted maximum evaluation of evidence — Whether prosecution proved its case beyond reasonable doubt — Penal Code ss 34 & 302

Criminal Procedure — Appeal — Evidence — Review or re-evaluate available evidence — Power of appellate court — Common intention — Establishment of — Trial judge failed to make proper finding of common intention — Whether serious flaw in decision and misdirection — Whether amounted to serious miscarriage of justice — Whether warranted appellate intervention — Whether conviction could be uphold despite misdirection where no miscarriage of justice detected — Whether sufficient evidence existed to infer common intention among all four appellants — Courts of Judicature Act 1964 s 60

Criminal Procedure — Conviction — Finding of guilt — Prejudice and biasness — Elements of — Statement in postscript — Trial judge's condemnation against first appellant — Whether trial judge was biased against first appellant — Whether occasioned failure and/or serious miscarriage of justice — Whether impartiality of trial judge doubted

The four appellants were convicted and sentenced to death for the murder of the deceased, a young lady. They were separately charged in two separate cases

heard together before the same trial judge. In this case, the first appellant hatched a plan to cause hurt to the deceased who was his girlfriend. He approached PW1 to carry out his plan but he declined. Instead, PW1 took the first appellant to meet the second appellant. The first appellant made a similar proposal to the second appellant who, after some discussions, agreed to the request. The first appellant then brought PW1 and the second appellant to Batu Kawa and showed them the deceased's house. Before leaving that night, the first appellant gave RM50 each to both the second appellant and PW1 and told them to wait for his telephone call. The following day, the second appellant went over to PW1's house and informed him that the first appellant had called him to cancel the plan as there were others willing to do the job. A day later, the second appellant met with PW1 at Kampung Gersik and told him that the first appellant had again requested them to do the job of causing injury to the face of the deceased. Following this, on instruction of the two appellants, PW1 had roped the fourth appellant and his younger brother, the third appellant. The four appellants and PW1 then met again at Kampung Gersik where the first appellant told PW1 and the second, third and fourth appellants to go to Ang Cheng Ho. At Ang Cheng Ho, the second appellant received a phone call from the first appellant asking them to go over to Batu Tiga behind the Siang Siang Corner. Shortly after that, PW1 saw the deceased coming out of a pub nearby and so did the second, third and fourth appellants. The first appellant immediately left the scene. The second appellant then pointed towards the deceased and asked the third and fourth appellants to go after her. Hardly few minutes later, the third and fourth appellants came back to the place where PW1 and the second appellant were waiting. PW1 saw that both the third and fourth appellants each had a knife with them and there were blood stains on the knives. PW1 also saw a lady's handbag. The second appellant then made a phone call to the first appellant who, about half an hour later, turned up and handed the second appellant a sum of RM1,600 which was later equally distributed between them. The first appellant, in his defence, admitted giving instructions to the second appellant to use his hands and not a weapon, to scratch the deceased's face in order to frighten her and stop her from going out at night. Further, the second appellant like the first appellant alleged that they were not physically present at the scene of the crime. The third appellant denied receiving any instructions to injure the deceased but had merely followed the fourth appellant. The third appellant stated that the injuries to the deceased were self-inflicted as a result of the struggle with him and the fourth appellant. The trial judge found the explanations given by the appellants were 'not only unbelievable because they defy common sense and are discordant with the common course of human affairs, but more importantly, they do not, taken as a whole, cast a reasonable doubt on the prosecution's case.' Before this court, several issues were taken by the appellants as follows: (i) for the first appellant, no common intention, biasness and prosecution leading two sets of conflicting evidence; (ii) for the second appellant, no prima facie case against the second appellant, no common intention, admission of

inadmissible evidence and failure of the trial judge to consider the evidence of the prosecution and defence adequately; (iii) for the third appellant, no common intention, failure of the trial judge to adequately and sufficiently consider the third appellant's defence, and the finding of trial judge against the third appellant unsupported by evidence; and (iv) for the fourth appellant, no common intention and no intention to kill.

Held, dismissing the appeal; affirming the conviction and sentence passed:

(1) To say that there was no evidence of complicity of the first appellant in the crime committed was wholly untrue. The facts presented, in particular with reference to the evidence of PW1, PW2 and PW9 clearly indicate the involvement of the first appellant. In fact, the first appellant was the one who orchestrated the whole episode and the rest of the appellants were merely acting at his behest. While it may be true that the first appellant was not anywhere near the scene of the crime of that fateful day, just minutes before that he was having discussions with the second appellant and left the other three appellants to carry out the crime the moment the deceased was seen coming out of the pub. Prior to that, the first appellant was going around looking for someone to do his bidding. Instructions were given by him to the second appellant in the various discussions he had with the second appellant minutes before the incident and on other occasions earlier (see paras 35–36).

(2) Bias certainly can take many forms, but merely expressing one's views and feelings of indignation could hardly be considered as being biased. Judges are but humans. They have feelings and emotions just like any other mortal. It takes more than just those expressive words of the learned trial judge in his written judgment to fault him for being biased or prejudiced against the first appellant and for that matter against any of them. There was no reason to doubt the impartiality of the learned trial judge (see paras 40–41).

(3) It is trite law that the prosecution does not have to prove that there exists between the accused persons who are charged with an offence read with s 34 of the Penal Code ('Code'), a common intention to commit the crime actually committed. It was the intention of the doer of the criminal offence charged that is in issue, and when s 34 applies, the others will be vicariously or constructively liable for the same offence. In other words, the participants need only have mens rea for the offence commonly intended. It was not necessary for them to also possess the mens rea for the offence with which they are actually charged (see para 53).

(4) The learned judge's address on the issue of common intention was rather sketchy and lacking specific finding. A good part of it was just a statement of the law on common intention. The absence of a finding as to the elements to establish constructive liability under s 34 was a serious error.

However, despite the misdirection, the conviction could still be upheld where no miscarriage of justice had been detected. Further, the appellate court, when hearing an appeal, had the power to review or re-evaluate all the evidence available (see paras 69 & 71); *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613 (FC) referred.

(5) This court would be slow to interfere with the findings of the learned trial judge as the primary trier of facts. In order to reverse the decision on such a matter this court must not merely entertain doubt whether his decision was right, but be convinced that it was wrong. Upon scrutinising and re-evaluating the whole evidence very carefully and based on the settled principles of law on common intention, there was sufficient evidence to infer common intention among all four appellants. Hence, the decision of the learned trial judge in convicting the four appellants on the charge of murder under s 302 and read with s 34 of the Code was not wrong (see paras 73–74 & 81).

[Bahasa Malaysia summary

Empat perayu telah disabitkan dan dihukum mati kerana membunuh si mati, seorang wanita muda. Mereka telah dituduh berasingan dalam dua kes berasingan yang didengar bersama di hadapan hakim perbicaraan yang sama. Dalam kes ini, perayu pertama telah membuat satu rancangan untuk menyebabkan kecederaan kepada si mati yang merupakan teman wanitanya. Dia telah berjumpa PW1 untuk melaksanakan rancangannya tetapi PW1 enggan. Sebaliknya, PW1 membawa perayu pertama berjumlah dengan perayu kedua. Perayu pertama telah membuat cadangan sama kepada perayu kedua yang, setelah beberapa perbincangan, bersetuju dengan permintaan itu. Perayu pertama kemudian membawa PW1 dan perayu kedua ke Batu Kawa dan menunjukkan mereka rumah si mati. Sebelum meninggalkan tempat itu malam tersebut, perayu pertama telah memberikan RM50 setiap seorang perayu kedua dan PW1 dan memberitahu mereka untuk menunggu panggilan telefonnya. Pada hari berikutnya, perayu kedua telah pergi ke rumah PW1 dan memberitahunya bahawa perayu pertama telah memanggilnya untuk membatalkan rancangan itu kerana ada yang sanggup melakukan kerja itu. Sehari kemudian, perayu kedua berjumpa dengan PW1 di Kampung Gersik dan memberitahunya bahawa perayu pertama sekali lagi meminta mereka melakukan kerja yang menyebabkan kecederaan kepada muka si mati. Berikutan itu, atas arahan kedua-dua perayu itu, PW1 telah mengajak perayu keempat dan adik lelakinya, perayu ketiga. Keempat-empat perayu dan PW1 kemudian telah berjumpa sekali lagi di Kampung Gersik di mana perayu pertama memberitahu PW1 dan perayu-perayu kedua, ketiga dan keempat untuk pergi ke Ang Cheng Ho. Di Ang Cheng Ho, perayu kedua telah menerima penggilan telefon daripada perayu pertama meminta mereka pergi ke Batu Tiga di belakang Siang Siang Corner. Sejurus kemudian, PW1 melihat si mati keluar daripada pub berdekatan dan begitu juga perayu-perayu kedua,

ketiga dan keempat. Perayu pertama dengan segera telah meninggalkan tempat itu. Perayu kedua kemudian menunjuk ke arah si mati dan meminta perayu-perayu ketiga dan keempat mengejarnya. Beberapa minit kemudian, perayu-perayu ketiga dan keempat datang semula ke tempat di mana PW1 dan perayu kedua sedang menunggu. PW1 melihat kedua-dua perayu-perayu kedua dan keempat masing-masing mempunyai pisau bersama mereka dan terdapat kesan darah pada pisau-pisau tersebut. PW1 juga nampak beg tangan wanita. Perayu kedua kemudian telah membuat panggilan telefon kepada perayu pertama yang, lebih kurang setengah jam kemudian, tiba dan menyerahkan perayu kedua sejumlah RM1,600 yang mana kemudiannya telah diagihkan sama rata antara mereka. Perayu pertama, dalam pembelaannya, mengakui telah memberi arahan kepada perayu kedua untuk menggunakan tangannya dan bukan senjata, untuk mencakar muka si mati bagi tujuan menakutkannya dan menghentikannya daripada keluar malam. Selanjutnya, perayu kedua seperti perayu pertama mengatakan bahawa mereka tidak ada secara fizikal ditempat kejadian jenayah itu. Perayu ketiga menafikan telah menerima apa-apa arahan untuk mencederakan si mati tetapi hanya mengikut arahan perayu keempat. Perayu ketiga menyatakan bahawa kecederaan kepada si mati adalah akibatnya sendiri kerana pergelutan dengannya dan perayu keempat. Hakim perbicaraan mendapati penjelasan yang diberikan oleh perayu-perayu 'not only unbelievable because they defy common sense and are discordant with the common course of human affairs, but more importantly, they do not, taken as a whole, cast a reasonable doubt on the prosecution's case.' Di hadapan mahkamah ini, beberapa isu telah diambil oleh perayu-perayu seperti berikut: (i) bagi perayu pertama, tiada niat bersama, berat sebelah dan pendakwaan membawa kepada dua set keterangan berlawanan; (ii) bagi perayu kedua, tiada kes prima facie terhadap perayu kedua, tiada niat bersama, kemasukan keterangan yang tidak diterima dan kegagalan hakim perbicaraan untuk mengambil kira pendakwaan dan pembelaan secara mencukupi; (iii) bagi perayu ketiga, tiada niat bersama, kegagalan hakim perbicaraan untuk dengan mencukupi dan memadai mengambil kira pembelaan perayu ketiga, dan penemuan hakim perbicaraan terhadap perayu ketiga tidak disokong dengan keterangan; dan (iv) bagi perayu keempat, tiada niat bersama dan tiada niat untuk membunuh.

Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman yang dijatuhkan:

(1) Untuk mengatakan bahawa tiada keterangan tentang penglibatannya dalam jenayah yang dilakukan adalah tidak benar sama sekali. Fakta yang dikemukakan, khususnya dengan merujuk kepada keterangan PW1, PW2 dan PW9 jelas menunjukkan penglibatan perayu pertama. Bahkan, perayu pertamalah yang merancang keseluruhan episod itu dan perayu-perayu lain hanya bertindak atas arahannya. Walapun ia mungkin benar bahawa perayu pertama tidak berada berdekatan tempat

kejadian jenayah pada hari tersebut, satu minit sebelum itu dia sedang berbincang dengan perayu kedua dan telah meninggalkan ktiga-tiga perayu lain untuk melakukan jenayah sejurus selepas si mati dilihat keluar daripada pub. Sebelum itu, perayu pertama sedang mencari seseorang untuk membuat tawarannya. Arahan telah diberikan olehnya kepada perayu kedua dalam pelbagai perbincangan antara dia dengan perayu kedua beberapa minit sebelum kejadian itu dan pada kejadian lain sebelum itu (lihat perenggan 35–36).

(2) Berat sebelah mempunyai banyak bentuk, tetapi hanya dengan menyatakan pendapat dan perasaan marah seseorang tidak boleh dianggap sebagai berat sebelah. Hakim hanyalah manusia. Mereka mempunyai perasaan dan emosi sama seperti manusia lain. Ia memerlukan lebih daripada perkataan hakim perbicaraan yang bijaksana dalam penghakiman bertulis beliau untuk menyalahkan beliau kerana bersikap berat sebelah atau prejudis terhadap perayu pertama dan untuk perkara itu terhadap mana-mana daripada mereka. Tiada sebab untuk meragui keadilan hakim perbicaraan yang bijaksana (lihat perenggan 40–41).

(3) Adalah undang-undang lapuk bahawa pendakwaan tidak perlu membuktikan sebenarnya wujud antara tertuduh-tertuduh yang dituduh dengan kesalahan dibaca bersama s 34 Kanun Keseksaan ('Kanun'), satu niat bersama untuk melakukan kesalahan yang sebenarnya telah dilakukan. Adalah niat pelaku kesalahan jenayah yang dituduh yang menjadi isu, dan apabila s 34 terpakai, yang lain menanggung liabiliti secara vikarius atau konstruktif untuk kesalahan sama. Dalam perkataan lain, peserta-peserta itu hanya perlu mempunyai mens rea untuk kesalahan yang bersama diniatkan. Adalah tidak perlu untuk mereka juga mempunyai mens rea untuk kesalahan yang mana mereka sebenarnya dipertuduhkan (lihat perenggan 53).

(4) Pendapat hakim-hakima bijaksana berhubung isu niat bersama tidak jelas dan tidak cukup penemuan. Sebahagian besarnya hanya kenyataan undang-undang berhubung niat bersama. Ketiada penemuan berhubung elemen-elemen untuk membuktikan liabiliti kontruktif di bawah s 34 adalah kesilapan serius. Walau bagaimanapun, meskipun berlaku salah arah, sabitan masih boleh dikekalkan di mana tiada berlaku ketidakadilan. Bahkan, Mahkamah Rayuan, apabila mendengar rayuan, mempunyai kuasa untuk menyemak semula atau menilai semula semua keterangan yang sedia ada (lihat perenggan 69 & 71); *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 CLJ MLJ 613 (MP) dirujuk.

(5) Mahkamah ini juga tidak harus segera campur tangan dengan penemuan hakim perbicaraan yang bijaksana sebagai pengadil awal fakta itu. Bagi tujuan mengakas keputusan itu berhubung perkara sebegitu mahkamah ini bukan hanya perlu mempunyai keraguan sama ada keputusan beliau

adalah betul, tetapi juga perlu yakin bahawa ia adalah salah. Setelah meneliti dan menilai semula kesemua keterangan dengan berhati-hati dan berdasarkan prinsip-prinsip tetap undang-undang berhubung niat bersama, terdapat keterangan mencukupi untuk membuat inferens niat bersama di atas semua empat perayu. Justeru, keputusan hakim perbicaraan yang bijaksana dalam mensabitkan keempat-empat perayu atas pertuduhan membunuh di bawah s 302 dan dibaca bersama s 34 Kanun tidak salah (lihat perenggan 73–74 & 81).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

For cases on common intention, see 4(1) *Mallal's Digest* (4th Ed, Reissue) paras 1477–1479.

For cases on evidence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 430–477.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Ahmad Najib bin Aris v PP [2007] 2 MLJ 505, CA (folld)
Andy bin Bagindah v PP [2000] 3 MLJ 644; [2000] 3 CLJ 289, CA (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Daniel Vijay s/o Katherasan and others v PP [2010] 4 SLR 1119; [2010] SGCA 33, CA (not folld)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2011] 5 MLJ 535, CA (refd)
Davies v Director of Public Prosecutions [1954] AC 378, HC (refd)
Duffey and Hunt's case (1830) 1 Lew CC 194 (refd)
Hari Ram v State of Uttar Pradesh [2004] 3 LRI 523, SC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209; [1969] 1 LNS 52, FC (refd)
Jamaluddin Md Kassim v PP [2010] 5 CLJ 928 (refd)
Lee Kwai Heong & Anor v PP [2006] 1 CLJ 1043, CA (refd)
Mahbub Shah v King Emperor AIR 1945 PC 118, PC (refd)
Mannam Venkatdri & Others v The State of Andhra Pradesh AIR 1971 SC 1467, SC (refd)
Medicaments and Related Classes of Goods (No 2), Re [2001] 1 WLR 700, CA (refd)
Mimi Wong & Anor v PP [1972] 2 MLJ 75, CA (refd)
Muhammad bin Kadar and another v PP [2011] 3 SLR 1205; [2011] SGCA 32, CA (not folld)
Om Prakash v State AIR 1956 All 241, CA (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (refd)
PP v Lee Eng Kooi [1993] 2 MLJ 322, HC (distd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

A *PP v Neoh Bean Chye & Anor* [1975] 1 MLJ 3, CA (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678, HC (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 AMR 4, CA (folld)
Shreekantiah Ramayya Munipalii v State of Bombay (S) AIR 1955 SC 287, SC (refd)
B *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, SC (refd)
Tunde Apatire & Ors v PP [2001] 1 MLJ 259, FC (refd)
United States v Morgan (1941) 313 US 409, SC (refd)

Legislation referred to

C Courts of Judicature Act 1964 ss 60, 92(1)
Evidence Act 1950 s 27
Penal Code ss 34, 299, 300
Penal Code [IND] s 34
Penal Code [SG] ss 34, 302

D *Anthony Tai (Roger Chin with him) (Anthony Tai) in Criminal Appeal No Q-05–184 of 2010 for the first appellant.*
Mohd Osman bin Ibrahim (Osman Ibrahim & Co) in Criminal Appeal No Q-05–185 of 2010 for the second appellant.
Arthur Lee Cheng Chuan (Arthur Lee Lin & Co) in Criminal Appeal No E *Q-05–186 of 2010 for the third appellant.*
Abdul Rahman (Ziyyad Mohammad & Co) in Criminal Appeal No Q-05–187 of 2010 for the fourth appellant.
Yaacub Ishak (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Balia Yusof JCA:

[1] The four appellants were convicted and sentenced to death by the G Kuching High Court for the murder of a young lady, Catherine Chong Jan Jun on 9 August 2007 ('the deceased').

[2] The four appellants were separatey charged in two separate cases, namely Kuching Criminal Trial Nos 45–4 of 2007 and 45–7 of 2007.

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[3] In Kuching Criminal Trial No 45–4 of 2007 involving the first, second and the third appellants, the charge reads:

> I That you together with three others, on 9.8.2007 at about 1.30 am at a spot at the car part of the Central Park Commercial Centre, in the District of Kuching, in the State of Sarawak, in furtherance of common intention of you all, committed murder by causing the death of Catherine Jan Jun (I/C No. 750812–13–5326(f), 32 years old and thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the same Code.

[4] The fourth appellant was charged in a separate case under Kuching High Court Criminal Trial No 45–7 of 2007. The charge preferred against him was similar with the charge against the first, second and third appellants.

[5] The two cases were heard together before the learned trial judge and all four appellants were found guilty as per the charges.

[6] Upon their conviction and sentence, all the four appellants have filed separate appeals. Hence, the present four appeals before us. We heard the appeals together and reserved our judgment on the same.

[7] We now give our judgment.

[8] At the outset, we feel it necessary to dwell into the facts of the case, perhaps with some details.

[9] The first appellant hatched a plan to cause hurt to the deceased who was his girlfriend.

[10] He approached PW1 (Sali Nimatullah bin Roslan) to carry out his plan. PW1 declined but instead took the first appellant to meet the second appellant. The first appellant made a similar proposal to the second appellant and the second appellant agreed after some discussions.

[11] Later, the first appellant brought PW1 and the second appellant to the deceased's house at Batu Kawa where they were shown the deceased's house. From Batu Kawa all the three then went to Semariang where there was a further discussion between the first and the second appellants taking place in the first appellant's car the details of which were unknown to PW1. Before leaving that night, the first appellant gave both the second appellant and PW1 RM50 each and told them to wait for his telephone call.

[12] The next day, the second appellant went over to PW1's house and told him that the first appellant has called him and has cancelled the plan as there were others willing to do the job.

[13] A day later, the second appellant met with PW1 at Kampung Gersik and told him that the first appellant had again requested them to do the job of causing injury to the face of the deceased.

[14] Following this, PW1 was instructed by the second appellant to rope in the fourth appellant. PW1 went over to the fourth appellant's house in Bintawa Hilir and told the fourth appellant to meet the second appellant at Kampung

Gersik. Together with PW1, the fourth appellant met the second appellant at Kampung Gersik and they had a discussion.

[15] Later, the first appellant arrived and the discussion continued between the first, second and fourth appellants. PW1 was not involved in the discussion.

[16] After the discussion, all of them went over to a pub at Ang Cheng Ho, Padungan in the first appellant's car. The first appellant wanted to identify the deceased to the second appellant. After identifying the deceased, all of them went back to Kampung Bintawa Hilir. Here, the fourth appellant went to see his younger brother, the third appellant, bringing him into the plot.

[17] The four appellants and PW1 then met again at Kampung Gersik where a further discussion took place. After the said discussion, the first appellant told the second, third, fourth appellants and PW1 to go to Ang Cheng Ho. The four went on two motorcycles. The first appellant did not go to Ang Cheng Ho with them.

[18] At Ang Cheng Ho, PW1, the second, third and fourth appellants went to have drinks. Soon after, the second appellant received a phone call from the first appellant asking them to go over to Batu Tiga behind the Siang Siang Corner. They arrived there at about 12.30am. It was on the 9 August 2007. The first appellant was not there but arrived soon after. Upon the first appellant's arrival, the second appellant went into the first appellant's car and some discussions took place between the two. Again, PW1 denied any knowledge about the subject matter of the discussion.

[19] Shortly after that, PW1 saw the deceased coming out of a pub nearby and so did the second, third and fourth appellants. The first appellant immediately left the scene. The second appellant then pointed towards the deceased and asked the third and fourth appellants to go after her. PW1 saw the deceased going to the back of the building with the third and fourth appellants following her. PW1 heard a woman's scream but did not see anything. His view was obstructed. Hardly 5–6 minutes later, the third and fourth appellants came back to the place where PW1 and the second appellant were waiting. The fourth appellant was seen to have blood stains on his trousers. They then went to a place beneath the Bintawa Bridge. Upon arriving under the Bintawa Bridge, PW1 saw both the third and fourth appellants each had a knife with them and there were blood stains on the knives. PW1 also saw a lady's handbag.

[20] The second appellant then made a phone call to the first appellant and about half an hour later the first appellant turned up and handed over to the

second appellant RM1,600 which was later equally distributed between them. After that, all four of them left for their respective homes.

[21] The prosecution's case against the appellants is further supported by the evidence of a close friend of the deceased in the person of Law Hung Ming ('PW2'). PW2 was a close friend of the deceased and knew that the first appellant was the deceased's boyfriend. On 2 August 2007, about a week before the untimely death of the deceased, she had confided to PW2 that the first appellant threatened to kill her by asking 3–4 persons to cut off her hands and legs and disfigure her face and will drive away with her car and her handbag to make it appear like a robbery. According to PW2, the deceased had also told her that early that morning she had been trailed by several persons, one of whom had introduced himself as Ah Boi.

[22] Another prosecution witness, Georgina Ting Nyi Chin ('PW9'), who was also a close friend of the deceased, testified that she knew the deceased's boyfriend by the name of Lucas Goh and on one occasion had overheard the deceased quarrelling with him over the phone over some matters relating to the advertising business of which they were erstwhile partners. PW9 also testified on the subject of the deceased telling her being followed by several men.

[23] PW10, one Norman bin Mahedin, testified that the first appellant approached him and offered to pay him and his cousin 'Ah Boi' to disfigure the face of the deceased. PW10 however refused to do so.

[24] At the close of the prosecution case, the learned trial judge found that a prima facie case has been established and called upon all the four appellants to enter their defence.

[25] All the four appellants chose to give evidence on oath.

[26] The first appellant elected to give evidence on oath. He admitted giving instructions to the second appellant to use his hands to scratch the deceased's face in order to frighten her and stop her from going out at night. His instruction to the second appellant was not to use any weapon. He denied to have ever spoken to the third and fourth appellants but only to the second appellant. He was not at the scene of the crime as he had left about an hour earlier and he admitted meeting all the three other appellants beneath the Bintawa Bridge and giving them the money. The first appellant also stated that he only knew about the death of the deceased some ten days later.

[27] The second appellant testified that PW1 introduced him to the first appellant. The first appellant wanted a certain lady to be inflicted with injury but not serious injury or which would result in death. The idea is to frighten her

only. The specific instructions given by the first appellant was to use the hand to scratch her face in order to frighten her without weapon. The first appellant showed him where the deceased lived and brought him to a pub where the deceased happened to be in to identify the deceased to him. On the night of the incident, while he, together with PW1, the third and fourth appellants were having drinks, the first appellant called him and asked them to go to Batu Tiga behind the Siang Siang Corner. The four of them went there and the first appellant arrived soon after. The second appellant then went inside the first appellant's car to have a discussion while the other three, PW1, the third and fourth appellants were outside. The second appellant was told by the first appellant that the deceased was inside a pub there. The first appellant then left. The second appellant then told the three of them that the deceased had just emerged from the pub and thereafter the third and fourth appellants went after her while he and PW1 waited on a motorcycle. Not long after that he heard a woman's scream, and saw the third and fourth appellants coming back to where he was waiting with PW1. Immediately thereafter, they left the scene and went to the Bintawa Bridge where he called the first appellant who then came and gave him some money.

[28] The third appellant denied receiving any instructions to injure the deceased. On the night of the incident, he simply followed the fourth appellant after the deceased came out of the pub. When he came near the deceased she attacked them with her handbag and tried to stab him with a knife. He explained and demonstrated that the injuries to the deceased were self-inflicted as a result of the struggle with him and the fourth appellant. The third appellant further stated that the moment the fourth appellant managed to grab the handbag from the deceased, the fourth appellant ran away and he followed suit. They ran towards where PW1 and the second appellant were waiting.

[29] The fourth appellant testified that he arrived at the scene of the incident at 1am together with PW1, the second and third appellants. About 10 minutes later the first appellant arrived in a car and the second appellant went inside the vehicle. After 2–3 minutes inside the car the second appellant told him in the hearing of the third appellant that the first appellant had reminded the second appellant that the injury to be inflicted on the deceased's face was to be carried out only with the hand without using any weapon and to ensure that the deceased did not sustain any serious injury. The second appellant also told him that the first appellant said that the deceased might be in one of the pubs in the area. Soon thereafter, PW1, who was also known as Bana, pointed towards the deceased who was walking and he stood up and followed the deceased. At that point of time since he was not too sure about the identity of the deceased, the fourth appellant stated that he changed his mind about injuring the deceased's face and decided to rob her of her handbag. The deceased then entered her car and he opened the door and grabbed the deceased's handbag. A violent scuffle

ensued with the deceased becoming the aggressor attacking him ferociously and angrily with a knife in one hand and a handbag in the other. As a result of the struggle he sustained a cut on his thumb. The deceased was also screaming. The fourth appellant further stated that the deceased also angrily attacked the third appellant who then kicked the deceased's hand allowing him to grab the handbag and run back towards where the second appellant and PW1 were waiting.

[30] The learned trial judge upon hearing the defence of the appellants found the explanations given by them 'not only unbelievable because they defy common sense and are discordant with the common course of human affairs, but more importantly, they do not, taken as a whole cast a reasonable doubt on the prosecution's case'. The appellants were found guilty as charged and sentenced to the mandatory death sentence.

THE APPEAL

[31] Arguing the appeal before us, four different counsel appeared for the four appellants. Considering the different issues taken by the appellants, we find it desirable to list the issues taken by each of the appellant as follows:

Issues raised by the first appellant

(a) no common intention;

(b) biasness; and

(c) prosecution leading two sets of conflicting evidence.

Issues raised by the second appellant

(a) no prima facie case against the second appellant;

(b) no common intention;

(c) admission of inadmissible evidence; and

(d) failure of the judge to consider the evidence of the prosecution and defence adequately.

Issues raised by the third appellant

(a) no common intention;

(b) failure of the judge to adequately and sufficiently consider the third appellant's defence; and

(c) finding of judge against the third appellant unsupported by evidence.

Issues raised by the fourth appellant

(a) no common intention; and

(b) no intention to kill.

BIAS

[32] Learned counsel for the first appellant launched his attack against the learned trial judge's finding of guilt against his client by submitting that the learned trial judge had clearly showed the elements of prejudice and biasness against the first appellant.

[33] By way of a postscript, the learned trial judge had stated at p 331 of the appeal record as follows:

> An appropriate postscript to this sad tragedy would be this: the killing of Catherine Chong Jan Jun an innocent and defenceless young woman here originated from the evil and twisted mind of Goh Wee Khian the 1st Accused whose cruelty and cowardice in hiring the killers to do his bidding make him unworthy even in the company of beasts; and the willingness of Farose bin Tamur Mohamad Khan (2nd Accused), Abdul Hadi bin Sabeni (3rd Accused) and Saidina bin Sabeni (4th Accused) to do so and then each accepting the RM400.00 soaked in the still warm blood of the dead young woman killed so brutally represent utterly deviant and despicable behaviour which defy any rational explanation.

[34] In his submission, Mr Anthony Tai submitted that the condemnation against the first appellant was without any justification and without any clear reference to the evidence and the fact of the case. Such adverse comments were made without any specific finding being made as to the complicity of the first appellant to the crime committed. Learned counsel concluded by saying that such prejudice and biasness shown by the judge has occasioned a failure and/or serious miscarriage of justice.

[35] In our view, to say that there was no evidence of complicity of the first appellant in the crime committed is wholly untrue. The facts presented, in particular with reference to the evidence of PW1, PW2 and PW9 clearly indicate the involvement of the first appellant. In fact the first appellant was the one who orchestrated the whole episode and the rest of the appellants were merely acting at his behest.

[36] While it may be true that the first appellant was not anywhere near the scene of the crime at about 1.30am of that fateful day, just minutes before that he was having discussions with the second appellant and left the other three appellants to carry out the crime the moment the deceased was seen coming out of the pub. Prior to that, the first appellant was going around looking for someone to do his bidding. Both the testimonies of PW1 and PW10 point to that. Instructions were given by him to the second appellant in the various discussions he had with the second appellant in his car minutes before the incident and on other occasions earlier.

[37] We are therefore unable to agree with learned counsel that the learned trial judge made that statement in his postscript without any reference to the evidence presented.

[38] The issue before us is simply whether in saying those words, the learned trial judge was biased against the first appellant.

[39] Lord Phillips of Worth Matravers MR in *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 at p 711 defined bias as follows:

> Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him.

[40] Bias certainly can take many forms, but merely expressing one's views and feelings of indignation could hardly in our view be considered as being biased. Judges are but humans. They have feelings and emotions just like any other mortal.

[41] In our view, it takes more than just those expressive words of the learned trial judge in his written judgment to fault him for being biased or prejudiced against the first appellant and for that matter against any of them. We have no reason to doubt the impartiality of the learned trial judge. Speaking of impartiality, Abdul Malik Ishak JCA, in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 5 MLJ 535 had the following to say:

> The pre requirements of a sound judicial system are independence and impartiality. For an effective and strong judicial system, the impartiality of its judges is of paramount importance. But it cannot be denied that the public's confidence in the judicial system is shaped and moulded more by appearances.

[42] It was further submitted before us that the prejudice and biasness shown by the learned trial judge has occasioned a failure and/or a serious miscarriage of justice.

[43] We fail to see in what way learned trial judge was prejudiced against the first appellant and neither has the learned counsel appraised us further on this issue. Similarly it has not been demonstrated how a failure or a serious miscarriage of justice has occurred.

COMMON INTENTION

[44] In his submission before us, learned counsel for the first appellant contended that the learned High Court judge had merely set out the general principles of common intention without directing his mind to the evidence pointing towards the inference of common intention against the first appellant. Learned counsel submitted, the first appellant was not physically present at the scene of the crime and neither did he participate in the commission of the murder. The first appellant never participated in the acts of the third and fourth appellants. The learned trial judge had erred in concluding that the first appellant had common intention with the third and fourth appellants to murder the deceased. The first appellant cannot be made vicariously or constructively liable for the same offence of murder committed by the third and fourth appellants. The intention to kill can only be attributed to the third and fourth appellants but not against the first appellant. The evidence of PW1 indicates that the intention of the first appellant was merely to cause injury by disfiguring the deceased without the use of any weapon.

[45] In support of his submission, learned counsel relied on two Singapore Court of Appeal cases namely, *Daniel Vijay s/o Katherasan and others v Public Prosecutor* [2010] 4 SLR 1119; [2010] SGCA 33 and *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205; [2011] SGCA 32.

[46] In *Daniel Vijay*'s case, the three appellants were Daniel, Christopher and Bala. The facts of the case are as follows:

> Sometime in May 2006, Ragu and Babu hatched a plan to carry out a robbery of expensive cargo to be transported by Sterling from CAC for delivery to consignees. Babu recruited Bala to carry out the robbery. Bala then recruited Daniel and Christopher to assist him in carrying out the robbery. Sometime before the day of the robbery, Daniel took the baseball bat from a workshop at Changi where he had his car serviced. Several days before the robbery, Babu and Bala went to survey CAC. They were driven there by Christopher. On the evening of 29 May 2006, Babu and the appellants met at a coffee shop at Block 125 Lorong 1 Toa Payoh to have some drinks. In the course of the evening, the robbery plan was discussed.

On 30 May 2006, at about 5.30am, Ragu contacted Babu and informed him that Sterling would be delivering the Cargo, which consisted often pallets of mobile phones (later found to contain 2,700 Sony Ericsson W700i mobile phones valued at about US$823,500), that morning from CAC to a consignee by lorry. Babu relayed the information to Bala, who was with Daniel and Christopher at that time. The Appellants then proceeded to the vicinity of CAC in a rented ten-foot lorry bearing the registration number GM9520E ('Lorry 9520'), taking with them the baseball bat. They subsequently met up with Babu, who told them that the lorry carrying the Cargo bore the registration number YM815B ('Lorry 815')).

At about 7am, the appellants saw Lorry 815 being driven out of CAC (by Wan). Bala directed Daniel to follow Lorry 815 in Lorry 9520, while Babu, who was also at the scene, drove off separately in another lorry. Somewhere along Changi Coast Road, Daniel drove in front of Lorry 815, causing Wan to stop it by the side of the road. After Wan alighted from Lorry 815, he was assaulted by Bala repeatedly on the head and other parts of the body with the baseball bat, although he was not rendered unconscious. He was then carried into the cabin of Lorry 815 and put on the floorboard in front of the passenger seat.

Daniel, together with Christopher, then drove Lorry 815 to Pasir Ris Car Park A at Jalan Loyang Besar in the vicinity of Costa Sands Resort ('Car Park A'). Bala followed in Lorry 9520. After arriving at Car Park A, Daniel and Bala transferred two pallets of the Cargo (comprising 540 mobile phones) from Lorry 815 to Lorry 9520. Bala then instructed Christopher to drive Lorry 9520 with the two pallets on board to Daniel's rented apartment in Ang Mo Kio ('the Ang Mo Kio Apartment'). Shortly after, Babu arrived at Car Park A to join Daniel and Bala, who transferred the remaining eight pallets of the Cargo (comprising 2,160 mobile phones) from Lorry 815 to Babu's lorry. Babu then left Car Park A with Daniel and Bala, while Lorry 815 (with Wan in it) was left at the car park. Later, Daniel and Bala met up Christopher, and they transferred the two pallets of the Cargo from Lorry 9520 to the Ang Mo Kio Apartment.

At about 8.52am that same day, a member of the public reported to the police that he found a man covered in blood in a lorry. The police went to investigate and found Wan sitting in the front passenger seat of Lorry 815. Wan managed to alight from the lorry on his own when the police opened the door of the passenger compartment. He was sent to Changi General Hospital, where he underwent emergency surgery on his head. He died without regaining consciousness on 5 June 2006, about five days after the robbery. The autopsy disclosed that at least 15 blows had been inflicted on Wan on the head and other parts of his body.

Police investigations subsequently led to the arrest of Bala, Ragu and Babu while Daniel and Christopher surrendered themselves to the police.

Ragu was charged with one count of abetment (by conspiracy) of robbery, punishable under s 109 read with s 392 of the Penal Code. He pleaded guilty and was sentenced by the District Court to six years' of imprisonment and 12 strokes of the cane. The sentence was reduced to four years and six months' imprisonment and six strokes of the cane on appeal to the High Court.

Babu was charged with:

(a) one count of abetment (by conspiracy) of armed robbery with hurt, punishable under s 109 read with ss 394 and 397 of the Penal Code.

(b) two counts of voluntarily assisting in the concealing and/or disposing of stolen property in furtherance of a common intention, punishable under s 414 of the Penal Code read with s 34; and

(c) one count of abetment (by conspiracy) of voluntarily assisting in the concealing of stolen property, punishable under s 109 read with s 414 of the Penal Code.

He pleaded guilty to all the charges and was sentenced by the High Court to a total of 16 years and six months' imprisonment and 24 strokes of the cane. He did not appeal against the sentence.

The three appellants were charged with the murder of Wan and all were convicted by the High Court. On appeal to the Court of Appeal, Bala decided not to pursue his appeal against the conviction and the Court of Appeal affirmed his conviction for murder. As for Daniel and Christopher, their conviction for murder was set aside and was substituted with a conviction for the offence of robbery with hurt under s 394 of the Penal Code.

[47] In a judgment delivered by Chen Sek Keong CJ, the Singapore Court of Appeal restated the law on constructive liability under s 34 of the Penal Code. The court held that there was insufficient evidence to prove beyond reasonable doubt the existence of a common intention among the appellants to cause Wan's death or inflict any injury on Wan. Section 34 had no application to Daniel and Christopher and they could not be held constructively liable for the offence of murder arising from the criminal act of Bala.

[48] In *Muhammad bin Kadar and another v Public Prosecutor* the first and second appellants who were brothers were charged under s 302 of the Penal Code read with s 34 of the Penal Code and both were convicted. On appeal to the Singapore Court of Appeal, the finding of the trial judge that the deceased was killed in furtherance of a common intention to commit robbery under s 302 of the Penal Code read with s 34 of the Penal Code was substituted with a conviction for murder under s 302 of the Penal Code in respect of Muhammad, the first appellant while Ismail, the second appellant's appeal was allowed and conviction was set aside.

[49] Following the decision in *Daniel Vijay*, the Singapore Court of Appeal held that for a joint liability under the doctrine of common intention as set out in s 34, the common intention of all the offenders must include an intention to commit the very criminal act done by the actual doer which resulted in the offence charged.

[50] In adopting the submissions of the first appellant's counsel, learned counsel for the second appellant has also referred to us *Ratanlal & Dhirajlal's Law of Crime* (24th Ed), p 102 quoting Park J in *Duffey and Hunt's case* (1830) 1 Lew CC 194: 'if three persons go to commit a felony, and one of them, unknown to the other, puts a pistol in his pocket and commits a felony of another kind, such as murder, the two did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they engaged with him in the felonious act that they went for'. At p 119 of the same, the learned author wrote, 'there is no law which lays down that a person accompanying the principal culprits share his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case'.

[51] Also joining and adopting the first appellant counsel's submission was learned counsel for the third appellant. Citing various authorities on common intention, he submitted that the third appellant should never have been vicariously convicted for the act of the other appellants, a similar argument put forth by the first appellant's counsel. Likewise, learned counsel for the fourth appellant also submitted there was no common intention on the part of his client and chose to adopt in full the submissions of the first appellant's counsel.

[52] As has been observed, it is always difficult if not impossible to prove by direct evidence the intention of an individual. In almost all cases it has to be inferred from his acts or conduct and other relevant circumstances of the case (*Mahbub Shah v King Emperor* AIR 1945 PC 118).

[53] It is trite law that the prosecution does not have to prove that there exists between the accused persons who are charged with an offence read with s 34 of the Penal Code, a common intention to commit the crime actually committed (*Mimi Wong & Anor v Public Prosecutor* [1972] 2 MLJ 75, *Public Prosecutor v Neoh Bean Chye & Anor* [1975] 1 MLJ 3). It is the intention of the doer of the criminal offence charged that is in issue, and when s 34 applies, the others will be vicariously or constructively liable for the same offence. In other words, the participants need only have mens rea for the offence commonly intended. It was not necessary for them to also possess the mens rea for the offence with which they are actually charged.

[54] Choor Singh J in *Public Prosecutor v Neoh Bean Chye & Anor* stated and quoted an illustration as follows:

> … In a criminal prosecution where s 34 of the Penal Code is invoked, it not incumbent on the prosecution to prove that there existed between the participants as a common intention to commit the crime actually committed. For s 34 to apply it is sufficient if the prosecution prove that there was in existence a common intention between all the persons who committed the criminal act and that the act

which constituted the offence charged was done in furtherance of that common intention. This is clear from the decisions of the Privy Council in *Barendra Kumar Ghosh v Emperor*, and *Mahboob Shah v Emperor*, and also from the recent decision of the Court of Criminal Appeal of Singapore in *Mimi Wong and Another v Public Prosecutor*.

In *Mimi Wong*'s case, Wee Chong Jin CJ who delivered the judgment of the court, explained the effect of s 34 of the Penal Code in the following words, at p 78:

> There is no doubt that for this section to apply there must be in existence a common intention between all the persons who committed the criminal act, and that a criminal act be done in furtherance of that common intention. When these two requirements are proved, each of such persons would be liable for the entire criminal act in the same manner as if he had done it alone.
>
> … If the nature of the offence depends on a particular intention the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then s 34 applies to make the others vicariously or collectively liable for the same offence. The intention that is an ingredient of the offences constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention, otherwise the criminal act done by the actual doer would not be in furtherance of the common intention. …

His Lordship gave the following illustration, at p 79:

> Thus if A and B form a common intention to cause injury to C with a knife and A holds C while B stabs C deliberately in the region of the heart and the stab wound is sufficient in the ordinary course of nature to cause death, B is clearly guilty of murder. Applying s 34 it is also clear that B's act in stabbing C is in furtherance of the common intention to cause injury to C with a knife because B's act is clearly consistent with the carrying out of the common intention and as their 'criminal act', ie that unity of criminal behaviour, resulted in the criminal offence of murder punishable under s 302, A is also guilty of murder.

[55] As contended by the second appellant's counsel, the second appellant like the first appellant was not present at the scene of the crime. Only the third and fourth appellants went after the deceased to the back of the shop houses and came back to the spot where the second appellant was waiting with blood stains on their hands and clothes. Learned counsel submitted that it is the prerequisite of s 34 that an accused person must be physically present at the actual commission of the offence charged. Section 34 envisages the criminal act to be done by several persons, as such, presence and participation is most crucial.

[56] Wee Chong Jin CJ in *Wan Hung Soon & Anor v Public Prosecutor* [1970] 1 MLJ 166 at p 179 in affirming the direction given by the trial judge to the jury stated that every person who participates in the commission of that criminal act would be liable as if he committed the act by himself, irrespective of the fact that he might have played only a very small part in the commission of the act.

[57] On the meaning of participation, in *Om Prakash v State* AIR 1956 All 241 the Allahabad Court of Appeal held that presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation. Every person charged with the aid of s 34 must in some form or the other participate in the offence in order to make him liable thereunder. He must have done something, however slight, or conduct himself in some manner, however nebulous whether by doing an act or by omitting to do an act so as to indicate that he was a participant in the offence and a guilty associate in it. Citing an example, Beg J went on to state:

> A person present on the scene might or might not be guilty by the application of s 34 of the IPC. If he is present on the scene for the purpose of participating in the offence, he would certainly be guilty as a participator in the offence. On the other hand, if he is present there merely as a spectator, he would not be guilty.
>
> Thus for example a person who is an eye-witness of the incident is present at the spot as well as a person who is a confederate of the assailant. The former is not guilty because he is present merely to see the commission of the crime. On the other hand, the latter is guilty because he is present for the purpose of seeing that the crime is committed. In other words, presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act.
>
> As observed by Their Lordships of the Privy Council in the case of 'Barendra Kumar Ghosh v Emperor', AIR 1925 PC 1 (C), 'It is to be remembered that in crimes as in other things 'they also serve who only stand and wait". The following observations of Mookerjee, J in the case of '*Emperor v Barendra Kumar Ghosh',* AIR 1924 Cal 257 (FB) (D), are relevant in this connection:
>
> > It is the expectation of aid, in case it is necessary to the completion of the crime and the belief that his associate is near and ready to render it, which encourage and embolden the chief perpetrator, and incite him to accomplish the act. By the countenance and assistance which the accomplice thus renders, he participated in the commission of the offence
> >
> > It is therefore, sufficient to hold a party as principal, if it is made to appear that he acted with another in pursuance of a common design; that he operated at one and the same time for the fulfillment of the same pre-concerted end, and was situated as to be able to furnish aid to his associates with a view to ensure success in the accomplishment of the common enterprise. (p 280)
>
> In a similar strain are the following instructive observations in the judgment of Richardson, J, in the same case:

> Moreover, it is impossible to say what might have happened, if one man alone had set out to accomplish the murder. Without the support moral and physical, of a comrade, his resolution might have failed him and his pistol remained in his pocket or diminution of confidence might have interfered with his aim; or again, he might have been successfully resisted and put to flight. (p 296)

At p 308 col (1) of the same case Ghose J has quoted the following illuminating passage from *Foster's Criminal Law*:

> Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him; some to commit the act, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged.
>
> They are all, provided the act be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprise. To sum up persons executing parts of a crime separately in furtherance of a common intention are equally guilty.

It is, therefore, not correct for the appellant's learned counsel to say that a person present on the spot does nothing. He plays a very important part in the scheme of the commission of the offence. The potential utility of a person who is present as a guilty confederate on the scene of offence cannot be overestimated.

The word 'criminal act' is used in s 34 of the IPC in the broadest possible sense. It would cover any word, gesture, deed or conduct of any kind on the part of a person whether active or passive, which tends to support the common design.

A 'criminal act' in s 34 of the IPC consists of the entire bundle of acts or omissions tied together with the chain of common intention that have combined to constitute the offence. The acts that it might comprise within itself may be similar or diverse.

[58] In *Shreekantiah Ramayya Munipalii v State of Bombay (S)* AIR 1955 SC 287, Bose J made the following observations:

> He need not be present in the actual room; he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or wait in a car on a nearby road ready to facilitate their escape, but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or other at the time the crime is actually being committed.

[59] Closer to home, Gopal Sri Ram JCA (as he then was) has expressed a similar view in *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 AMR 4. At p (MLJ); pp 22–23 (AMR) of the report, delivering the judgment of the Court of Appeal, His Lordship stated:

[31] The main point made and emphasised by both learned counsel for the fourth and fifth accused is that there must be presence and participation for s 34 to bite. They argue that since neither of their clients was present at either the scene of the abduction nor at the place where the deceased was done unto death, nor at the scene where her body was cast into the ravine s 34 has no application to the fourth and fifth accused. With respect, as a matter of law, we are unable to agree with this submission. In our judgment, presence in every case is not necessary for s 34 to apply. In our judgment, s 34 should be interpreted having regard to modern technological advances. The early decisions on the section, admittedly by the Privy Council, that held presence to be essential for s 34 to bite were handed down at a time when modes of communication were not as advanced as today. It would, in our judgment, be a perversion of justice if we are required to cling on to an interpretation of the section made at a time when science was at a very early stage of development. We find support for our view from the judgment of Thomas J in *Suresh v State of Uttar Pradesh*, where His Lordship said:

> Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract s 34, eg the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why s 34 cannot apply in the case of those two persons indicated in the illustrations.
>
> Thus to attract s 34 of the IPC two postulates are indispensable; (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person (2) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.
>
> Looking at the first postulate pointed out above, *the accused who is to be fastened with liability on the strength of s 34 of the IPC should have done some act which have nexus with the offence.* Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of s 32 of the IPC. So the act mentioned in s 34 of the IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensible to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for

A the accomplishment of the crime, s 34 of the IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of s 34 of the IPC. (Emphasis added.)

B [32] So too here. The fourth and fifth accused were, on the evidence already rehearsed, acting in concert. By means of the cell-phone and other conversations, they were very much constructively present and participated in the abetment of the killing of the deceased. We may add that there is no quarrel by the defence that on the evidence, if accepted, there was abetment. There was no submission made that the elements of abetment were not made out as a matter of law. We therefore find it C unnecessary to discuss the law upon that subject.

[60] We have carefully read the two Singapore Court of Appeal authorities cited by learned counsel for the first appellant. We note that the Singapore D Court of Appeal was restating the law on constructive liability under s 34 of the Penal Code.

[61] In *Daniel Vijay*'s case, the Singapore Court of Appeal was seeking to realign the legislative policy on gang robbery with murder and on murder in a E non-gang robbery scenario as well as the legislative policy on the imposition of constructive liability on secondary offenders under s 34 of the Penal Code. This is evident from the concluding paragraph of the judgment which states:

In short, if the putative Mimi Wong (CCA) test were good law, there would be a F misalignment between, on the one hand, the legislative policy on gang-robbery with murder and, on the other hand, the legislative policy on murder in a non-gang-robbery scenario (as well as the legislative policy on the imposition of constructive liability on secondary offenders pursuant to s 34 generally). In our view, it is desirable that the legislative policy underlying s 34 be aligned with that G underlying s 396 of the Penal Code. These two legislative policies have been misaligned ever since the putative Mimi Wong (CCA) test arose. Our restatement of the law on s 34 will align these two legislative policies.

[62] Against this backdrop, we have also examined our own local authorities H on the same issue and we must confess that we are not persuaded by the two Singapore Court of Appeal authorities cited before us. We are more inclined, and we subscribe to the views expressed in *Sabaruddin b Non*'s case. We are however, thankful to Mr Anthony Tai for his submissions.

I **[63]** The learned trial judge had rightly stated the general principles on common intention citing the case of *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 1 CLJ 1043 as a point of reference. In the said case, the Court of Appeal referred to the often quoted cases of *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344 and *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC). These

authorities merely state the general principles on s 34 of the Indian Penal Code which is in pari materia with s 34 of the Penal Code.

[64] In this respect we find it necessary to reproduce what the learned trial judge had stated in dealing with the issue of common intention. At pp 330–331 of the appeal record, His Lordship stated:

> The law relating to common intention is set out in two Indian authorities the relevant passages of which are reproduced by the Court of Appeal in *Lee Kwai Heong & Anor v Public Prosecutor* [2005] 1 CLJ 1043 at pp 1064–1065:
>
> > To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s 34. In *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344. Sethi J speaking for himself and Agrawal J said:
> >
> > > Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. (Emphasis added.)
>
> In *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arjit Pasayat J said:
>
> > Under the provisions of s 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s 34, when an accused is convicted under s 302 read with s 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch Pulla Reddy & Ors v State of Andhra Pradesh* AIR 1993 SC 1899, s 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34 it is not necessary to show some overt act on the part of the accused.

[65] Earlier, at the end of the prosecution case, the learned trial judge has also found that there was common intention to kill formed between the four appellants. At pp 328–329 of the appeal record the learned trial judge noted:

> On the totality of the evidence there was, in the circumstances just before the 3rd and 4th Accused went after the deceased on that fateful morning of 9.8.2007, a common intention to kill the deceased formed.
>
> Irrespective of the events prior to that, the evidence of PW1 relating to that point in time admits of no other inference, considering the fact that minutes later the 3rd and 4th Accused returned and the deceased later found dead at the place where she was attacked by the 3rd and 4th Accused and the 1st and 2nd Accused both saw the deceased come out of the pub just before the 3rd and 4th Accused went after her and attacked her after the 2nd Accused had pointed her out to the 3rd and 4th Accused.

[66] Next, Mr Anthony Tai, learned counsel for the first appellant further submitted that there was a serious miscarriage of justice arising from the failure of the learned trial judge to make a specific finding and directing his mind to the evidence adduced to show in what way the evidence had established common intention and what was the evidence he had relied on to draw an inference of common intention. For a conviction of an offence read together with s 34 of the Penal Code it is necessary that there should be a finding as to the common intention of the participants. It cannot be left for conjecture or inference (see *Ratanlal & Dhirajlal's Laws of Crime* (26th Ed) p 150).

[67] Our perusal of the learned trial judge's grounds of judgment left us with a disappointment of not having found it. The excerpts from the judgment which we have reproduced earlier that address the issue of common intention are rather sketchy and lacking in specific finding. A good part of it is just a statement of the law on common intention. The absence of a finding as to the elements to establish constructive liability under this section is a serious error. The Indian Supreme Court in *Mannam Venkatdri & Others v The State of Andhra Pradesh* AIR 1971 SC 1467 has set aside a conviction by the High Court because of its failure to record any finding as to what was the common object or the common intention of the appellants, nor has it recorded any finding as to what was the criminal act done by the appellants in furtherance of their common intention or what was the offence committed in prosecution of the common object.

[68] Assuming for a moment that we agree with the learned counsel's submissions that the learned trial judge has failed to make a proper finding on common intention which we agree is a serious flaw in the decision and is a misdirection, should we in the exercise of our appellate jurisdiction intervene?

[69] In *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ

193, the Federal Court referred to the case of *Tunde Apatire & Ors v Public Prosecutor* [2001] 1 MLJ 259 which relied on the proviso to s 92(1) of the Courts of Judicature Act 1964 ('CJA 1964') and held that as a general rule, the appellate court will in normal course of events, quash a conviction where there has been a misdirection. Exceptionally, it said, a conviction will be upheld despite a misdirection where the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. In other words, the court would still uphold the conviction despite the misdirection where no miscarriage of justice has been detected.

[70] For this court, we may resort to the proviso to s 60 of the CJA 1964.

[71] In another Federal Court case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800, Zulkefli Makinuddin FCJ (as he then was) speaks of the powers of the appellate court to review or re-evaluate all the evidence available when hearing an appeal. At pp 628–629 (MLJ); p 812 (CLJ) of the report His Lordship states:

> Power Of Appellate Court To Review Or To Re-evaluate All Available Evidence
>
> As regards the first main ground of appeal raised by the appellant, I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. *The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings.* In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial Court are correct. (See *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122). In the present case even though the Court of Appeal took the view that the High Court judgment was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and how it had implicated the appellant. There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from the witnesses called by the prosecution as appearing in the appeal records. I am therefore of the view that the Court of Appeal did not err on this issue. (Emphasis added.)

[72] We are therefore entitled to do as what the Court of Appeal did in the *Ahmad Najib*'s case.

[73] It is also settled that this court will be slow to interfere with the findings of the learned trial judge as primary trier of facts (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 at p 211; [1969] 1 LNS 52, *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289, *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, *Jamaluddin Md Kassim v Public Prosecutor* [2010] 5 CLJ 928). In order to reverse the

decision on such matter we must not merely entertain doubt whether his decision was right, but be convinced that it was wrong.

[74] We have scrutinised and re-evaluated the whole evidence very carefully and based on the settled principles of law on common intention which we have averted to earlier, we find that there is sufficient evidence to infer common intention among all four appellants.

[75] The first appellant was the master planner of the whole crime. He hatched the plan to injure the deceased went around scouting for others to carry out his plan. Without his role of identifying the deceased to the other appellants and without his payment no one would agree to his bid. He may not be at the scene of the crime or has not lifted a finger in the killing of the deceased but his exhortation and motivation for the commission of the crime must be seen to be part of the chain of events that leads to the murder of the deceased. His disappearance just minutes before the deceased was seen coming out of the pub was no coincidence. So was his reappearance (under the Bintawa Bridge) immediately after the commission of the crime. Surely the payment of RM1,600 to the other appellants was an inducement and a motivation by him. It may be a paltry sum but enough to induce the commission of the crime. It was paid soon after the crime was completed and without even bothering to find out what has happened to the deceased which gave rise to the further inference that he knew what has become of the deceased. Participation by the first appellant may be overt or covert and participation in our view need not in all cases be by physical presence.

[76] The role played by the second appellant was no less significant. Besides recruiting the third and fourth appellants and taking them around to meet the first appellant in his car each time the first appellant came over to discuss their plan. He happens to be the only English speaking person among the other appellants acting as the go between. It was the second appellant who pointed the deceased to the third and fourth appellants and asking them to go after the deceased, the moment the deceased was seen leaving the pub on that fateful night. While the third and fourth appellants were pursuing the deceased, the second appellant and PW1 waited at their motorcycles. Soon after, the second appellant called the first appellant and they met under the Bintawa Bridge where he was given the RM1,600 by the first appellant which he then distributed it equally with the other two appellants and PW1. Clearly the evidence suggested that he facilitated the commission of the offence. His absence from the actual scene of the crime is in our view of little or no significance.

[77] As to the third and fourth appellants, we can justifiably conclude that both were armed with knives which according to PW1 was about 8 ins long.

They were the actual perpetrators of the crime. It is inconceivable that the deceased was fighting with the third and fourth appellants with a knife in one hand and her handbag in the other. Even more perplexing is the fact that both the third and fourth appellants had a knife each with them when they gathered under the Bintawa Bridge. Was the deceased carrying two knives with her, since both the third and fourth appellants said they were unarmed?

[78] There was sufficient evidence that points to the culpability of the two. A woman's scream was heard very soon after the two followed the deceased. About 5–6 minutes later the two were seen with a bloodstained trousers and a bloodstained knife. Together, there was a lady handbag which was later confirmed to belong to the deceased. There was in our view overwhelming circumstantial evidence that the third and fourth appellants caused the injuries to the deceased which led to her death. This we add, was done at the behest of the first and second appellants. There was in our view a unity of purpose and there was certainly a meeting of the minds between the four appellants as to what was to be done and which was carried out by the third and fourth appellants. They, (the first and second appellants) may have planned to injure the deceased but certainly it went too far. They must be held liable for the consequence and eventualities of their design. There was in our view common intention between them and although the first and second appellants never partake in the actual commission of the offence the full force of the law enshrined under s 34 of the Penal Code will afford no escape for them.

[79] The learned trial judge has also considered the evidence of the photologist ('PW3') as to the nature of the injuries suffered by the deceased and we totally agree with his finding that the injuries caused to her neck which severed the internal jugular vein was potentially fatal. The deceased also suffered three stab wounds on the chest.

Altogether the deceased suffered nine sharp wounds and the cause of death was stated to be neck injury due to stab wounds.

[80] We further took note of the learned trial judge's concern about the evidence of PW1 whom he had treated, correctly we must say, as an accomplice. The learned trial judge was certainly sure of the nature of his evidence and had treated it with caution and had also found corroboration. We agree with His Lordship.

[81] Upon our review and re-evaluation of the totality of the evidence, we are convinced that the decision of the learned trial judge in convicting the four appellants on the charge of murder under s 302 of the Penal Code and read with s 34 of the Penal Code is not wrong. As stated in *Dato Mokhtar Hashim v Public Prosecutor* and *Jamaluddin Md Kassim v Public Prosecutor*, in order to

reverse the decision made by the trial judge we must, not merely entertain doubt whether his decision was right, but we must be convinced that it was wrong.

[82] We are not so convinced.

OTHER GROUNDS

[83] As we have indicated earlier, the appeal by the four appellants were brought separately and different grounds were advanced by each of the appellants separately. The issue of common intention is a common one.

[84] We will now deal with the other grounds of appeal by each of the appellants.

(a) Two sets of conflicting evidence

[85] The last ground of appeal brought up by the first appellant in respect of his conviction is on the issue of two sets of conflicting evidence.

[86] Although the first appellant has filed no less than 12 grounds of appeal, at the date of hearing of the appeal he chose to proceed only on three grounds which we have listed down earlier. In this third ground, it was submitted before us the learned trial judge had erred in convicting the first appellant on two sets of conflicting evidence preferred by the prosecution.

[87] The first version of the prosecution evidence against the first appellant is the one given by PW1 saying that the first appellant had wanted only to cause injury on the deceased's face. The second version is the one given by PW2, Ms Law Hung Ming, a close friend of the deceased. As can be recalled from the facts of the case as stated in the earlier part of this judgment, PW2 had stated that about a week before her death, the deceased had confided in her that the first appellant would kill her by asking three to persons to cut off her hands and legs and disfigure her face and will drive away with the deceased's car and handbag to make it appear like a robbery.

[88] Citing *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322, learned counsel for the first appellant submitted that in the face of the two conflicting evidence, the court is left with no reliable and trustworthy evidence upon which a conviction of the first appellant can be based on. Learned counsel again submitted that a failure and/or a serious miscarriage of justice has occurred.

[89] In our view, learned counsel's reliance on the above mentioned

authority is misplaced. The facts of that case are clearly distinguishable with the instant appeal. In that case the two witnesses called by the prosecution to prove possession of the firearm give a completely different version. Besides the learned trial judge in the case even remarked the witness PW3 had given evidence in an unethical manner and had utterly discredited himself as a witness. The judge further stated that the court views with abhorrence the cavalier manner in which the said witness had held out to the court.

[90] Having perused the evidence of PW1 and PW2 ourselves, we are of the view that there were no material contradictions in the evidence of these two witnesses as to what was intended by the first appellant. Both stated that the first appellant intended to cause injury to the deceased's face but PW2 merely said that the first appellant wanted to kill the deceased by disfiguring her face and cutting her limbs.

[91] The appellant's learned counsel submitted that there was an error by the learned High Court judge which had occasioned a failure and/or serious miscarriage of justice.

[92] We are unable to see the error committed by the learned trial judge in respect of the reception of the evidence of these witnesses.

[93] The learned trial judge clearly made a finding that His Lordship accepted the evidence of PW1 and further held that his evidence was not uncorroborated. It is made clear to us that such corroboration must have come from among others the evidence of PW2.

[94] We find no fault with the learned trial judge's treatment of the evidence. The trial judge has the advantage of seeing and hearing the witnesses and has the discretion to accept or reject a particular witness's testimony. The judge has also the discretion to accept some parts of the witness's testimony and reject the other.

[95] We find no merit in learned counsel's submission and we do not see how a failure and/or a serious miscarriage of justice has occurred.

(b) Failure of the judge to sufficiently consider the defence evidence

[96] This common ground is brought up by the second and third appellants.

[97] In advancing his argument on this ground learned counsel for the second appellant submitted:

(a) the learned judge failed to consider or sufficiently consider or at all that the deceased was in possession of a knife particularly bearing in mind that there was a threat made against her;

(b) the learned judge erred in law and/or in fact in failing to consider the evidence of the appellant in the correct perspective and failed to give due consideration to his evidence;

(c) the learned judge erred in not examining the relevant evidence of the appellant correctly as against the witnesses for the prosecution with the probability or improbability of the case; and

(d) the learned judge erred in not adopting the strong legal principles to the facts and surrounding circumstances of this case.

[98] Learned counsel for the third appellant adopted the submissions of the second appellant's counsel and further added that the finding of the learned trial judge cannot be supported by the evidence adduced.

[99] In his defence, the second appellant amongst others stated that the deceased was armed with a knife and this was not considered by the trial judge. The third appellant also stated that he was assaulted by the deceased with her handbag. Mr Arthur Lee, learned counsel for the third appellant even made a submission before us that the probability of self inflicted wound was not considered. The fourth appellant stated he was attacked by the deceased and suffered a cut on his thumb.

[100] The third appellant also stated that the fourth appellant was assaulted by the deceased and she was armed with a knife. There was a fierce fight between the deceased and the third and fourth appellants with the deceased being the aggressor. Both the third and fourth appellants said the deceased attacked them with a knife. The fourth appellant even stated that the deceased was attacking him with a knife in one hand and a handbag in the other.

[101] We have perused the grounds of judgment by the learned trial judge. On the consideration of the defence evidence this is what the learned trial judge had found:

> The distinctive feature of the explanations given by the first, second, third and fourth accused are their departure from their initial stand in attacking the credibility of the testimony of PW1 as mere concoctions to save his own skin and thus denying having anything to do with the alleged offence. The explanations given by the first and second accused were identical in that they never intended to have serious injury inflicted on the deceased let alone have her killed. The injury they both wished to be inflicted was a mere scratch on her face without any weapon and was just to frighten her. The explanation given by the third and fourth accused were also identical to the extent that they were victims of the deceased who violently and angrily attacked them with a knife and that her injuries were self-inflicted as a result of the third and fourth accused defending themselves. The fourth accused's additional explanation

was that he changed his mind about injuring the deceased and decided to rob the deceased of her handbag instead which then led to the attack on him by the deceased.

[102] Simplistic as it may be, but we do not think it is fair to say that the trial judge had failed to consider the defence. Learned trial judge could only have so stated in his grounds after sieving through the evidence by the respective appellants. One would not expect the judge to consider in minute details each and every possibility that may arise from the episode such as the possibility of self-inflicted wounds on the deceased. We thought it was most preposterous forlearned counsel to have even suggested that. Did counsel realise that the deceased suffered nine stab wounds on her neck and chest? We note that both the third and fourth appellants did not give any explanation as to how the deceased could possibly suffer those stab wounds.

[103] Upon being cross-examined by the learned DPP and shown the photographs Nos 47–48 in exh P2 as to how those injuries suffered by the deceased on her chest, neck and abdomen were caused, the third appellant replied:

> Saya tidak tahu. Kemungkinan dalam pengelutan, dia cuba untuk mencucuk saya dengan pisau dan saya ada memulas tangan dia, untuk menghalang dia dari mencucuk saya.

Further questions by the learned DPP:

> Q: Kamu lihat kecederaan di leher, perut dan di dada. Boleh kamu jelaskan bagaimana terdapat banyak kecederaan kepada badan Catherine Chong Jang Joon jika betul apa yang kamu cakapkan kecederaan ini mungkin berlaku sewaktu kamu memulas tangan beliau?
>
> A: Semas pergelutan, dia ada mengalihkan tangan dia sedangkan saya sendiri susah mahu mengawal pergerakan tangan dia.
>
> Q: Boleh kamu jelaskan bagaimana kecederaan di leher berlaku jika ia disebabkan oleh kamu memulas tangan Catherine Chong Jang Joon?
>
> A: Semasa dia mengalihkan tangan dia.

[104] It would be an insult to one's intelligence to swallow that sort of explanation by the third appellant. There is a passage in *United States v Morgan* (1941) 313 US 409 at p 421 which says that judges 'are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances'.

[105] The third and fourth appellants merely told the court that there was a fierce fight between them and the deceased who was armed with a knife and she

was the aggressor. We agree with the learned trial judge that their explanations were mere concoctions to save their own skin and denying having anything to do with the death of the deceased. The learned trial judge found it fit to label the appellants' explanation to be 'unbelievable because they defy common sense and discordant with the common course of human affairs'. We agree.

[106] We find no merits on this ground.

(c) No prima facie case and finding of the judge cannot be supported by evidence

[107] Learned counsel for the second appellant submitted that there was no prima facie case established against his client, while learned counsel for the third appellant submitted the finding of the learned trial judge cannot be supported by evidence.

[108] Seventeen witnesses were called by the prosecution to prove its case against the appellants. While we agree it is not the number of witnesses that count, the learned trial judge was right in emphasising on the credibility of those witnesses. The learned trial judge found, upon a maximum evaluation of the evidence a prima face case against all the appellants in accordance with the requirements set out in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85. In his assessment of the evidence, the learned trial judge has also considered the ingredients of the offence for which the appellants stand charged and the weight of the evidence from the witnesses in particular the evidence of PW1 whom he found to be an accomplice.

[109] We cannot find any reason to fault the learned trial judge's finding of a prima facie case against the appellants. There is no merit in the second appellant's submission on this issue.

[110] Without specifically identifying which finding of the learned trial judge that cannot be supported by evidence, the written submission of the third appellant's counsel was focused on the defence of culpable homicide and whether the prosecution has proven its case beyond reasonable doubt. Related to this, is the other issue of whether there was intention to kill brought up by the fourth appellant as his other ground of appeal. We feel these three issues may be dealt with together.

[111] Mr Arthur Lee, learned counsel for the third appellant submitted that the case against his client should be under s 299 and not s 300 of the Penal Code. The third appellant was merely acting on the instruction of the first appellant to cause facial injury by scratching her face. There was no intention to kill. Echoing a similar argument, learned counsel for the fourth appellant

also submitted that there was no intention to kill on the part of the fourth appellant. The fourth appellant had changed his intention to rob the deceased of her handbag instead.

[112] We do not find any merit in this submission. The learned trial judge was right in concluding at p 329 of the appeal record:

> From the injuries inflicted on the deceased, the 3rd and 4th Accused must be taken to have the intention of causing bodily injury to the deceased and did inflict these injuries on the deceased and the bodily injuries intended to be inflicted is sufficient in the ordinary cause of nature to cause death. (See: S 300(c) Penal Code). The circumstances did not admit of any other reasonable conclusion. In *Eng Sim v Public Prosecutor* [1974] 2 MLJ 168 at p 168 Gill C.J. delivering the judgment of the Federal Court quoted a passage from *Martin v Osborne* [1936] 55 CLR 367 at p 375:
>
> > If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of facts to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued. The moral tendencies of persons, their proneness to acts or omission of a particular description, their reputations and their associations are in general not matters which it is lawful to take into account, and evidence disclosing them, if not otherwise relevant, is rigidly excluded.

[113] We find this ground to be also devoid of any merits.

[114] Mr Arthur Lee's next ground centred on the issue of whether the prosecution has proven its case beyond reasonable doubt. He submitted the prosecution has not. Three grounds were advanced to support his contention.

(a) the prosecution has relied on the uncorroborated evidence of PW1 who is an accomplice;

(b) the learned trial judge has erred in law in not conducting the necessary evaluation of the evidence afforded by the third appellant; and

(c) the learned trial judge has not filtered and evaluated the evidence of the third appellant.

Citing a passage from the judgment of Vincent Ng J in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678:

> Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected.

[115] We pause here to note that grounds number (b) and (c) are a reflection of one another. We will deal with them as one issue.

[116] We have earlier in this judgment stated that the learned trial judge had done a maximum evaluation of the evidence before him to find a prima facie case against the appellants and considered the authorities of *Public Prosecutor v Mohd Radzi Abu Bakar* and *Balachandran v Public Prosecutor*.

[117] We also found the learned trial judge has considered and evaluated the evidence of the appellants including the third appellant. We have even quoted the relevant passage of the judgment which we say was rather simplistic. But we find there was filtering and there was evaluation of the appellant's evidence. In the concluding paragraph of his judgment, the learned trial judge has made a conscious effort of explaining that the prosecution has proved its case beyond reasonable doubt. This could only have been done after evaluation and filtering the evidence tendered before the court. At p 332 of the appeal record, the relevant paragraph reads:

> In the light of all the evidence adduced, the explanations advanced by the 1st, 2nd, 3rd and 4th Accused are not only unbelievable because they defy common sense and are discordant with the common course of human affairs, but more importantly, they do not, taken severally or as a whole cast a reasonable doubt on the Prosecution case. In the circumstances, I find that the Prosecution has proved its case beyond reasonable doubt and accordingly find the 1st, 2nd, 3rd and 4th Accused guilty and convicted each of them as charged pursuant to S 182A(2) of the Criminal Procedure Code.

[118] In our view, the learned trial judge could not have said so unless His Lordship had evaluated the evidence.

[119] On his submission that the prosecution has relied on the uncorroborated evidence of PW1, who was an accomplice, learned counsel for the third appellant referred to us the case of *Davies v Director of Public Prosecutions* [1954] AC 378 where Lord Simonds LC referred to the rule that where a person who is an accomplice gives evidence on behalf of the prosecution it is the duty of the judge to warn the jury that although they may convict upon his evidence it is dangerous to do so unless it is corroborated and observed that this rule applies only to witnesses for the prosecution.

[120] In our view, the submissions on the uncorroborated evidence of PW1

is misplaced. On the contrary, the learned trial judge has addressed the issue of accomplice evidence and found that the evidence of PW1, the accomplice was not uncorroborated. The learned trial judge has also addressed the issue of the danger of conviction on the uncorroborated evidence of an accomplice. At p 324 of the appeal record, the learned trial judge stated:

> I was satisfied also that the case for the Prosecution did not contain any reasonable doubt even though PW1 who was a material witness for the Prosecution was decidedly an accomplice whose evidence had to be treated with caution but here the evidence of PW1 was not uncorroborated and did not give rise to any reasonable doubt in the Prosecution's case as a whole.

[121] We feel the learned trial judge has adequately considered the issue and we agree with his finding that there was corroboration of PW1's evidence. Accordingly we find no merit in the submissions of learned counsel and this ground must fail.

(d) Admission of inadmissible evidence

[122] This ground of appeal was brought up by the second appellant.

[123] PW17 the investigating officer arrested the second appellant on 14 August 2007. The next day while in a police van on the way to the scene of the crime the second appellant gave an information to PW17 in his own dialect which PW17 reduced it into writing and was produced and marked as exh P56. The said exhibit was accepted after much objection from the defence which was overruled by the learned trial judge.

[124] Following what was told by the second appellant in exh P56, PW17 lodged a police report which was produced and marked as exh P57, also after much objection by the defence. Again the learned trial judge overruled the defence objection. In overruling the defence objection to the admission of exh P56, the learned trial judge also indicated that the grounds will be given later in his written judgment.

[125] Before us, learned counsel for the second appellant urged the court to disallow the prosecution from relying on this evidence. The said two exhibits were purportedly tendered in court pursuant to s 27 of the Evidence Act 1950. Learned counsel doubted the comtemporaneity of the said exhibit in particular exh P56. He also doubted whether the exact words spoken by the second appellant were recorded taking into consideration that PW17 was not well versed in the Sarawak Malay language.

[126] The information given by the second appellant in exh P56 was about

A the third and fourth appellants and his offer of showing the house of the two in Bintawa. The third and fourth appellants are brothers. The information further says the fourth appellant's finger had a knife cut.

[127] In his judgment, the learned trial judge merely considered the B evidence of PW17 as the senior investigating officer who went to the scene at about 2.15am on 9 August 2007, found the deceased lying on the ground and examined the injuries. He then had the deceased handed over to the attendant at the hospital mortuary.

C **[128]** No where in the judgment did the learned trial judge make any reference or mention about exhs P56 and P57 and neither was there the promised ruling on P56.

[129] In our view it is quite apparent that the learned trial judge did not give D any consideration to these two exhibits. The information given by the second appellant to PW17 led to the arrest of the third and fourth appellants and that was about all. We do not see any prejudice to the second appellant on the admission of these two exhibits. For that matter, neither can we say that it was prejudicial to the third and fourth appellants. The learned trial judge never relied on the two exhibits and we do not think the admission of the said two E exhibits was fatal to the case. It was not such a material evidence which cannot be ignored.

[130] In the light of the above, we fail to appreciate learned counsel's objection to the said two exhibits. The second appellant's appeal premised on F this issue must fail.

[131] We agree with the learned trial judge that the brutal killing of a young woman for a meagre sum of RM1,600 is indeed a despicable act. It was orchestrated by the first appellant on whose bidding the crime was finally G carried out with the other appellants, each playing their own roles.

[132] We have given our anxious consideration to the submissions made before us, both written and oral and having perusal of the appeal records.

H **[133]** It is our unanimous view that there is no merit in this appeal. We accordingly dismiss the appeal by the four appellants above named and we affirm the conviction and sentence passed by the High Court.

Appeal dismissed; conviction and sentence passed affirmed.

I Reported by Ashgar Ali Ali Mohamed